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IN THE

Supreme Court of the United States

October Term, 1964

No. 355

BERNARD SUSSER, et al.,
Petitioners,

vs.

CARVEL CORPORATION, et al.,
Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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Opinions Below

The opinion of the Court of Appeals is reported at 332 F. 2d 505. The opinion of the District Court is reported at 206 F. Supp. 626.

Jurisdiction

The judgment of the court below was entered on May 8, 1964 (R. 456). A petition for a writ of certiorari was filed on August 6, 1964 and was granted on October 26, 1964 (R. 459). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Statutes Involved

Title 15, United States Code.

§ 1. TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL; EXCEPTION OF RESALE PRICE AGREEMENTS; PENALTY

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * * July 2, 1890, C. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 14. SALES, ETC., ON AGREEMENT NOT TO USE GOODS OF COMPETITOR

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

Questions Presented

1. Whether the admitted sales policy and practice of the Carvel respondents, whereby they conditioned their franchise to retail dealers, the use of their trade marks and the sale and lease of their patented equipment, upon the dealer's purchase, use and sale in connection therewith other unpatented products of said respondents, constitute *per se* violations of the antitrust laws.

2. Whether an exclusive dealing contract, where it is an integral part of a proscribed tie-in arrangement, is a *per se* violation of the antitrust laws.

3. Whether trademark protection justifies proscribed tying and exclusive dealing contracts.

4. Whether the agreements between Carvel and the supplier respondents,[1] whereby the latter are obliged to refrain from dealing with or selling to petitioners, violate the Sherman Act.

5. Whether the admitted practice and policy of the Carvel respondents constitutes unlawful price maintenance in violation of the Sherman Act.

Statement of the Case

Petitioners were plaintiffs in nine private antitrust suits brought in the Southern District of New York. Each was or had been a franchisee of one of the Carvel respondents. There was a joint trial before the court on the issue of liability alone. Petitioners agreed to rely solely on *per se* violations and to limit their evidence to written agreements and other documents (R. 5).

The several corporate Carvel respondents (referred to collectively as Carvel) franchise independent dealers to manufacture and sell at retail frozen dairy products, chiefly soft served ice cream, under various "Carvel" trademarks. Carvel itself neither produces nor sells such ice cream nor does it own or hold any of the Carvel trade marks, whether by registration or assignment, all of which are registered in the name of and owned by one Thomas Carvel.

Carvel also engages in the manufacture of a patented freezer used in the manufacture of soft ice cream which is

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[1] Eagle Cone Corporation, H. P. Hood & Sons and Rakestraw's Dairy Products, Inc.

available and sold to its franchised dealers and to no others under any conditions (R. 42). In connection and simultaneously with the execution of the franchise agreements (Pl. Ex. 1, R. 208, 3149, and Ex. 2, R. 221; 3150), Carvel sells and leases to the dealer the patented freezer and other patented and unpatented equipment required for the operation of a franchised store (R. 34, 35; Pl. Ex. 3, R. 349, 3154; Ex. 4, R. 239, 3156; Ex. 6, R. 242, 3158). Ex. 1 is the franchise agreement used generally by Carvel subsequent to 1955 and is typical of some 200 such agreements (R. 10, 11). Ex. 2 is typical of the pre-1955 agreement (R. 11). All told, Carvel had some 400 franchised stores located principally in nine or ten states (R. 19, 30). Ex. 3, reciting that the equipment is sold "subject to the franchise contract", is typical of the pre-1955 sales contract (R. 12) whereas Ex. 4 is typical of the post-1955 sales agreement (R. 12).

By Ex. 6, Carvel leases to the dealer, amongst other things, patented equipment for use in the operation of the franchised store, conditioned upon the lessee's faithful performance of the terms of the land lease covering the store premises. The lease of these items is further conditioned upon the dealer's compliance with the terms of the franchise agreement (see "conditions" annexed to Ex. 4). The land lease itself (R. 14, Pl. Ex. 7A, R. 250, 3162) is conditioned upon the dealer's faithful compliance with the terms of the franchise.

The franchise agreements require the dealer to purchase from Carvel or its designated approved sources his entire requirements of mix [2], toppings, flavorings, cones and all other ingredients or supplies whether they are integral parts of the soft ice cream end product or merely used in connection with the sale thereof to the ultimate consumer. All such ingredients and supplies are sold by Carvel to the dealer at a profit. The mix is manufactured for Carvel by

[2] The basic ingredient used in the manufacture of ice cream.

designated dairies and drop shipped to all Carvel dealers in the territory allocated to such dairy (Pl. Ex. 10, R. 252, 3186; Ex. 15, R. 337, 3204). Ice cream cones are similarly drop shipped by a designated manufacturer to dealers located in its assigned territory. The specifications for cones are that they be "of a quality no less good than the standard quality cones produced by the Supplier at the time of the execution of this agreement" (Pl. Ex. 11, R. 264, 3186, 7). The manufacturers of both mix and cones bill same to the dealers on Carvel invoice forms at prices determined by Carvel (Pl. Ex. 10, 11 and 15; R. 179). All other ingredients and supplies are manufactured for Carvel by designated suppliers in accordance with specifications and standards of quality furnished by Carvel (R. 39, 41, 197, 199, 200, 203).

In this connection, Walter Simonsen, Hood's sales manager (R. 180) testified that there are many concerns who supply comparable flavorings (R. 39). Fred Vettel, Jr., Carvel's general manager (R. 32) also admitted that ingredients of comparable quality are obtainable from other than Carvel designated sources, but that Carvel does not furnish dealers with specifications and would not permit the dealer to purchase same even if they met Carvel specifications (R. 40, 1). He asserted that it would be impossible for Carvel to determine whether its dealers were following the specifications (R. 41).

The franchise agreements further require the dealers to refrain from selling any other frozen dairy product or any products of any kind unless first approved by Carvel. The agreements also prohibit the dealer from operating a competitive dairy products business anywhere during the term of the agreement. Additionally, they require the dealers to operate their stores in accordance with a Standard Operating Procedure Manual (Pl. Exs. 8 and 8a, R. 15)[3] which is "deemed to be an integral part of this agreement

[3] These exhibits were brought to the court pursuant to Rule 38

with the same force and effect as if it were physically included herein" (Pl. Ex. 1, R. 210). Further requirements were a conditional reassignment of the lease by the dealer to Carvel as security for the former's adherence to the terms of the franchise (Pl. Ex. 7, R. 245, 3162).

Each of the plaintiffs entered into franchise agreements with Carvel. The basic agreement was revised by Carvel in 1955 so that two types of franchise are involved (Pl. Exs. 1 and 2). Four of the plaintiffs[4] entered into the early franchise while the others had the later franchise.

From 188 stores in October, 1954 (R. 29), Carvel stores grew to between 350 and 400 in 1959 (R. 30). Carvel's gross sales of ingredients and supplies ranged from $2,738,255 in 1954 to $3,965,923 in 1960. Including equipment sales, the total figure for 1954 was $4,383,001 and for 1960, $4,460,689. The sales of mix alone were $1,972,352 in 1954 and $2,611,324 in 1960 (R. 29).

It is conceded that the end product manufactured by the dealer is a new product not delivered by Carvel (R. 15).

The Franchise Agreement

In the early franchise (Pl. Ex. 2), the dealer agrees to sell only Carvel frozen dairy products (par. 4[b]); to purchase only Carvel mix (4[c]); to purchase all equipment from Carvel (4[d]); to purchase and use only Carvel approved paper goods, napkins, cones, extracts, and spoons (4[e]); to devote the store and the premises *solely* to the sale of Carvel products and for no other purpose (4[h]); to pay a royalty to Carvel on every gallon of mix (4[j]); to refrain from selling any frozen products other than that processed from Carvel mix through Carvel freezers, and to refrain from selling any other product without Carvel's written consent (4[o]); to refrain from using the store

[4] Susser, McCoy, Frederick and Mueller.

for any purpose other than the sale of Carvel products (4[t]); to maintain prices as per the SOP and to refrain from conducting reduced price sales without Carvel's written consent (4[x]); and to refrain from engaging in a dairy products or competitive business at any other location during the term of the franchise.

Par. 5(b) provides for a loan agreement for the use of the front assembly plate and certain signs and other insignia.

Upon termination of the franchise, the dealer is prohibited from engaging, directly or indirectly, in the sale of frozen dairy products for a period of five years (par. 27).

Par. 29 permits Carvel to change the SOP in price and quantity of merchandise to be dispensed, and further provides that any uniform change in the operational sales price of the products shall be uniformly increased throughout the operation of all Carvel stores.

The loan agreement referred to in par. 5(b). (Ex. 5), covers the patented front assembly plate, including the decorator tip, and certain signs and insignia. These remain the property of Carvel and are forfeited upon, *inter alia*, breach of the franchise agreement.

Par. 15 gives Carvel the right upon termination or cancellation of the agreement for any reason to have the lease of the premises assigned to it without receiving compensation therefor, and par. 16 similarly gives Carvel the right upon termination or cancellation for any reason to purchase the Carvel freezers at 50% of cost during the first year and less an additional 10% for the second year and a further sum of 5% for each year thereafter.

Par. 18 requires the dealer to provide at his own expense product liability insurance with limits of $100,000/$300,000 for the protection of Carvel.

Par. 30 requires the dealer, in the event his volume of business reaches a certain figure, to purchase additional Carvel equipment.

Under par. 5(e), the dealer is granted an exclusive territory within one-half mile in either direction of his location, while par. 27 prohibits him, upon cancellation of the franchise, from engaging in a similar business for a period of five years therefrom.

In the later franchise (Ex. 1), the dealer agrees to sell only Carvel's frozen dairy product solely in accordance with the SOP and no other product (par. Fourth); to purchase from Carvel or approved sources his *entire* requirements of mix, toppings, flavorings, cones, ingredients and all items sold as part of the end product (Sixth); to pay a royalty on each gallon of mix (Seventh); to refrain from mortgaging or otherwise encumbering the premises or equipment (Nineteenth); and to refrain from engaging in a similar business for five years and within a radius of 25 miles after termination of the franchise (Thirty-first).

The agreement also provides that the dealer shall have the right to sell the product at any price he determines (Eighth) and that he may purchase equipment and paper goods from other sources provided they meet Carvel standards and the specifications contained in the SOP (Ninth).

Par. Twelfth grants the dealer an exclusive territory within one-half mile in a metropolitan area or two miles in a suburban area in either direction of the store, whereas par. Thirty-first restricts the dealer, upon termination, from engaging in a similar business for a period of five years and within a radius of twenty-five miles of the store.

The pre-1955 and post-1955 SOP (Exs. 8 and 8A) are substantially identical. In both, Section B requires the dealer to devote his store and premises solely to the sale of Carvel frozen dairy products. Section D, under Point

of Sale Advertising, requires the dealer to only use sign material in accordance with Carvel specifications, which he must obtain from Carvel. Invariably, such sign material is furnished with the retail price already printed thereon. Section H lists commissary supplies that *must* be purchased from Carvel. Section K, page 2, requires the dealer, in the event he plans a special sale other than those promoted by Carvel, to secure permission "to sell merchandise at a price below the standard permitted". Page 9 of Section K prohibits the sale of Christmas trees or any other merchandise not approved by Carvel. Section M, Equipment Specifications, specifies the use of the front head and decorator tip Patent #D167443 (front plate assembly) and refrigerated front display case, Patent #D170003, both Carvel patents.

The Carvel-supplier contracts

a. Hood (Pl. Ex. 10, R. 252, 3186)

Hood delivers mix to Carvel stores in Massachusetts and Connecticut.[5] The contract of May 14, 1956 required Carvel to purchase all its requirements of mix from Hood in said area. Hood also agreed to deliver *only* Carvel mix to the Carvel stores, and no other mix or ice cream preparation of any kind. Hood invoices the stores on Carvel bill forms, at prices fixed by Carvel, makes collections for Carvel and follows Carvel's instructions concerning credit advanced to each dealer.

b. Rakestraw (Pl. Ex. 15, R. 337, 3204, 5)

Rakestraw delivers mix to Carvel stores in Pennsylvania.[6] Its agreements with Carvel are substantially identical with the Hood agreements.

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[5] Hood is named as defendant in the Susser, Modick, McCoy, Ossola, Phelan and Seu cases.

[6] Rakestraw is named as defendant in the Pierce, Giberman and Pazdro actions.

c. Eagle Cone (Pl. Ex. 11, R. 264, 3186, 7)

Carvel agreed to purchase all its requirements of cones from Eagle in the tri-state area of New York, Connecticut and Massachusetts.[7] The agreement called for cones of a specific design only for Carvel and for no other person. Eagle also billed the dealers on Carvel bill forms at prices agreed upon by Carvel and Eagle.

Concerning the price maintenance aspect of the case, plaintiffs' proof consisted exclusively of documentary evidence, all of which originated from Carvel. The early franchise (Ex. 1, pars. 4(x) [R. 227] and 29 [R. 237]) imposed a price maintenance policy upon the dealers. Carvel's Ex. C-1B (R. 283, 3514) purported to permit dealers to unilaterally fix resale prices. Vettel testified that subsequent to the adoption of the later franchise (Pl. Ex. 2), Carvel supplied dealers with advertising posters containing alternate prices (R. 162) and also supplied posters with blank spaces for prices (R. 162, 3). Plaintiffs' exhibits however, emanating from Carvel during the same period, reflect a determined effort by Carvel to compel adherence by its dealers to a policy of resale price maintenance.

The District Court ruled that the validity of the franchise agreements should be judged in the light of the principle relating to protection of trade marks and found that no *per se* illegality had been established and that the restrictions were within the permissible limits of *F.T.C.* v. *Sinclair Refining Co.*, 261 U. S. 463. The Court did find a price-fixing violation with respect to the four plaintiffs under the earlier franchise but found no price fixing arrangement subsequent to the adoption of the new franchise and the dissemination by Carvel of Ex. C-1B.

While the Court of Appeals affirmed the District Court, Chief Judge Lumbard held that plaintiffs had proved the

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[7] Eagle Cone is named as defendant in the Susser, Modick, McCoy, Ossola, Phelan and Seu cases.

essentials of an unlawful tying agreement through the use of the Carvel trade marks as the principal feature of the franchise system furnishing the requisite economic leverage. The majority, however, held that no unlawful tie-in had been established, that the amount of commerce involved was inconsequential and any damage to the plaintiffs even less so.[8] The Court found the evidence on price maintenance to be contradictory and therefore sustained the District Court. It also ruled that the exclusive dealing and restrictive provisions of the franchise were reasonably necessary to protect Carvel's good will.

Summary of Argument

I

As understood today, *per se* offenses are those restraints "which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1, 5, 78 S. Ct. 514. The *per se* concept, as opposed to the rule of reason, is essentially an evidentiary one delimiting the extent of proof necessary for a plaintiff to prevail. It obviates any inquiry into competitive effect. It requires only a finding of a particular act, practice, agreement or arrangement. The defendant is limited to challenging that fact alone.

This principle of *per se* unreasonableness thus "avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort

[8] The trial actually proceeded on the issue of liability alone with the question of damages reserved for a future trial if plaintiffs prevailed. No effort was made to prove damages.

to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Northern Pacific Railway Co.* v. *United States,* 356 U. S. 1, 5, 78 S. Ct. 514.

In essence, the *per se* doctrine results after a cumulative series of rulings, adverse to a particular practice, so that the courts take judicial notice that its effect is to substantially restrain trade, and thereupon indulge in a presumption that the sole intent underlying the practice is to achieve such an anti-competitive effect.

II

The Carvel system of operation involves the sale, loan or lease of patented and unpatented equipment as well as the use of trademarks, on condition that the dealer use same only in conjunction with Carvel mix and other equipment and supplies required to be purchased from Carvel, and no other. Such agreements constitute *per se* violations of § 1 of the Sherman Act when the party imposing the condition has a dominant position with respect to the tying product and a not insubstantial volume of interstate commerce is affected. *Northern Pacific Railway Company* v. *U. S.* 356 U. S. 1, 78 S. Ct. 514.

The *Northern Pacific Railway Company* case defined "monopoly power" or "dominance" over the tying product as nothing more than "sufficient economic power to impose an appreciable restraint on free competition in the tied product" (pp. 11, 521). And it is established that a patent is sufficient to supply the requisite of "dominance" for the application of the *per se* rule of unreasonableness to tying arrangements.

Assuming, as the concurring opinion in the Court of Appeals stated, that the patented items involved "cannot realistically be considered the 'tying product' or the focus of the arrangement", it is urged that the use of the Carvel trademark, found by Judge Lumbard to be the "principal

feature of the Carvel franchise system", supplies the requisite economic power which this Court defined in the *Northern Pacific Railway* case. Nor can a license to use a trade name sanction unlawful restraints such as are here involved. *Dictograph Products, Inc.* v. *F. T. C.*, 217 F. 2d 821 (2 Cir.). And this Court has earlier held that a valid trademark licensing system may not be implemented by restraints of trade which extend beyond protection of the mark. *Timken Roller Bearing Co.* v. *U. S.*, 341 U. S. 593, 71 S. Ct. 971.

The protection of good will or the compulsion of contractual obligations cannot justify proscribed tying arrangements. *United States* v. *Loew's, Incorporated*, 371 U. S. 38, 83 S. Ct., 97, *International Salt Co., Inc.* v. *United States*, 6 F. R. D. 302 (S. D. N. Y.), aff'd 332 U. S. 392, 68 S. Ct. 12. The Carvel mark could be lawfully and sufficiently protected through definition of standards for the different products used. While Vettel testified that this was not done because it would be "impossible to police it" (R. 41), the fact remains that Carvel maintained an extensive supervisory system policing every facet of the dealer's operation (Pl. Ex. 76, R. 413, 414, 3384). Carvel failed to prove that quality control and avoidance of public deception could not be accomplished by methods other than anti-competitive restraints.

The District Court found that it would be an unreasonable burden to require Carvel to furnish its dealers with specifications of standards for products (R. 59). No evidence supports this except Vettel's testimony that it would be "impossible to police it". But Vettel also testified that Carvel does furnish such information to its many suppliers (R. 196-200). Conceivably, if such details can be given the supplier, they can be given the dealer. The Court also found that "the agreements indicate that Carvel would approve the use of accessory supplies from alternate sources of supply if an adequate check on standards could be main-

tained" (R. 59). The agreements not only contain no such provision, but Vettel's testimony effectively negated this conclusion (R. 41).

It is thus clear that the patented equipment and devices, the trade marks, and the exclusive ownership of "a unique system for the production, creation, sale and distribution at retail, of Carvel's Frozen Dairy Products" (Pl. Ex. 1, R. 208), cloak Carvel with the mantle of dominance requisite to a proscribed tying agreement.

The concurring opinion, in arguing that plaintiffs had failed to prove that "a not insubstantial amount of commerce is affected", stressed that in New York, Connecticut and Massachusetts there were "250 Carvel dealers out of a total of 125,000 outlets where ice cream cones could be purchased—amounting to one fifth of one percent of the outlets and apparently doing about one percent of the business" (R. 451). This overlooks repeated holdings that industry wide economic data need not be shown in a *per se* case nor is it necessary to prove, through voluminous economic statistics, that the public generally has been injured. *Northern Pacific Railway Co.* v. *United States, supra.* Moreoever, Carvel itself did not engage in the manufacture and sale of ice cream. Carvel competed, not with ice cream stores or manufacturers of ice cream, but with suppliers of machinery, equipment, ingredients and supplies to those engaged in the manufacture and retail sale of soft ice cream. The District Court found that Carvel's volume of business was substantial (R. 20, 29) and since that business is foreclosed to competitors by Carvel's restrictive agreements, it follows that "a not insubstantial amount of commerce is affected".

III

The record is clear that the Carvel franchise is an exclusive dealing, all requirements contract. Generally such contracts have not been ruled illegal *per se. Tampa Electric Company* v. *Nashville Coal Co.*, 365 U. S. 320, 81 S. Ct. 623.

But the exceptions noted in the *Tampa* case preclude application of the general rule and dictate that the agreements here involved meet the standard of *per se* illegality.

The fact that the stores may be of uniform design is not controlling. There is no evidence in the record of the public's association of a Carvel store as one where *only* Carvel products are sold. The Court can take judicial notice that many types of stores display uniform signs and have uniform appearances, yet deal in products other than those indicated by the signs.[9]

We agree with Judge Lumbard that the antitrust laws do not "proscribe a trademark owner from establishing a chain of outlets uniform in appearance and operation" (R. 448). But that right cannot be expanded to immunize the unlawful extension of a trademark to validate antitrust activity under the guise of goodwill protection. For it is basic that every anticompetitive practice condemned by the antitrust laws is designed, primarily, to enhance the goodwill of the product or business involved. The cases cited by Judge Lumbard are easily distinguishable (R. 448). They do not reflect, as does this case, that the underlying and perhaps sole purpose of the agreements was to restrain and foreclose competition.

Thus, the agreements under consideration can have no other result than an adverse effect upon competition. And since a substantial number of outlets and a substantial number of products, *whether considered comparatively* or not, are involved, the requirement of showing a lessening of competition has been met. *United States* v. *Standard Oil Co., of California,* 78 F. Supp. 850 (DC Cal).

When considered not as an independent act standing alone and divorced from other suspect activities, but as an integral part of the web of illegality spun by Carvel, and as an ally implementing the pattern of proscribed behavior,

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[9] Rexall Drug Stores, for example.

these agreements become indelibly colored with *per se* illegality. It is obvious that the franchise effectively forecloses other suppliers from dealing with Carvel stores. Thus, as this Court said in the *Standard Stations* case [10] (pages 314, 1062),

> "the qualifying clause of § 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected. It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage * * * "

IV

By the terms of their contracts with Carvel (Pl. Ex. 10, R. 252, 3186; Ex. 11, R. 264, 3186-7; Ex. 15, R. 337, 3204), the supplier defendants are obliged to refrain from dealing with the Carvel store owners. The Hood (Ex. 10) and Rakestraw's (Ex. 15) agreements (par. 5 [f]) require such dairies to deliver "only Carvel Mix to Carvel stores, and no other ice cream mix or ice cream preparation of any kind." These agreements also call for all of Carvel's requirements.

It must be concluded that the supplier defendants were aware that the Carvel dealer was an independent business man. The agreements required these defendants to drop ship to each store and to bill the store on Carvel invoice forms (D. Exs. H-5, R. 326, 3553-4; H-6, R. 327, 3554; and H-7, R. 328, 3555-6). The suppliers were also required to collect from each dealer and to remit to Carvel. In such a situation, the agreements to sell Carvel all of *its* requirements when, obviously, the requirements were those of the independently owned stores, necessarily imputes to these defendants a knowledge and awareness of the restrictive provisions of the Carvel-dealer agreements.

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[10] *Standard Oil of California* v. *United States*, 337 U. S. 293, 69 S. Ct. 1051.

It follows, therefore, that the Carvel-supplier contracts constituted boycott agreements whereby the supplier defendants each agreed to refrain from direct selling to the store owners. Thus, they precluded the dealers from all products except those specified by Carvel and they restricted trade between the dealers and suppliers even in the specified products. Such agreements constitute *per se* violations of the antitrust laws. *Klors, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207, 79 S. Ct. 705; *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211, 71 S. Ct. 259.

V

It is elementary that price fixing is a per se violation of Section 1 of the Sherman Act. It is equally elementary that proof of illegal price maintenance needs no specific agreement but may be shown by Carvel's policy and methods in securing the cooperation of its dealers. *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 42 S. Ct. 150.

It is undisputed that the early franchise (par. 4 [x] of Pl. Ex. 2 establishes a per se violation. The dispute here centers about Carvel's practices subsequent to the sending of D. Ex. C-1B (R. 283, 3514) in February of 1956. In this area, plaintiffs' proof was based on communications emanating exclusively from Carvel which effectively negate the change in policy stated in Ex. C-1B.

Thus, the post-1955 Standard Operating Procedure Manual (SOP) (Pl. Ex. 8A, R. 15) makes several references to "Standard selling price". Pl. Ex. 40 (R. 379, 3281) required maintenance of a 10 and 20 cent price "as recommended in the SOP", Pl. Ex. 41 (R. 381, 3281) threatened termination of franchise for sales "at wholesale prices". Pl. Ex. 42 (R. 275, 3283) requested advance notice of special sales "so that we may approve them". The franchise and SOP require use of only Carvel approved advertising material and signs which are furnished by Carvel with

prices printed thereon (Pl. Ex. 39, 3278-80)[11]. To insure that such advertising material was used, no credit was given for cooperative advertising unless same was approved by Carvel *prior* to publication. Carvel further prohibited dealers from using the Carvel name in connection with signs of price changes.

The clear policy was to maintain a level of prices. Thus, when Carvel gave permission for special sales, it insisted upon notifying neighboring stores so that they could participate therein. The board of governors, a body of dealers appointed by Carvel, makes "recommendations for the change in the recommended level of price changes" (R. 35). Other letters indicate that despite Vettel's testimony to the contrary, Carvel did not have signs "without recommended prices". The evidence further reveals that Carvel inspectors reported dealers' price deviations to Carvel.

The record is clear that following the revision of the early franchise, Carvel successfully continued a policy designed at maintaining a level of prices. The proof clearly warrants such a presumption which cannot be rebutted by self-serving statements but only by evidence of actual sales at other than the suggested prices.

The court of appeals held that the evidence on price-fixing was contradictory (R. 436). But the fact is that the contradiction consisted of Carvel contradicting itself. Plaintiffs' evidence was exclusively derived from Carvel letters and other documents. The contradiction mentioned by Judge Lumbard arose when Carvel sought to avoid the clear implications of its own documents. This is not such a contradiction as creates a factual issue the determination of which will not be reviewed on appeal.

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[11] This exhibit was brought to court pursuant to Rule 38.

VI

We submit that the Carvel system is revealed as a vast, interrelated scheme whose only purpose and effect is to restrain competition. Every aspect of the Carvel operation is an integral part of that plan. The intent underling it stands out in bold relief under the cold light of analytical scrutiny. The alleged justifications of business convenience or protection of goodwill are exposed as sham.

We have here classic tying agreements and exclusive dealing arrangements which are implemented by the restrictive agreements with the suppliers. Further implementation is found in the land lease which is conditioned upon compliance with the franchise, and the conditional reassignment of the lease as security for the dealer's adherence to the terms of the franchise. The franchise prohibits the dealer from operating a competing business anywhere else and unreasonably restricts his ability to engage in business upon termination of the franchise despite the obvious fact that, upon termination, he could no longer use the Carvel name and therefore could not damage the trademark.

The contractual requirement that *only* Carvel signs and trademarks be used in or about the premises foreclosed the dealer from acquiring products from competitors of Carvel and indicating to the public by appropriate signs that such products offered for sale were not Carvel products.

The proper function of a trademark is to indicate the origin or ownership of the goods to which it is affixed. Yet the products sold to the consuming public were manufactured by the dealer; they were not Carvel's products nor did they originate from Carvel. We do not dispute Carvel's right to protect its trademark, insofar as lawfully possible, and to prevent deception through violation of the trademark. We do not dispute the propriety of Carvel's desire

that its dealers carry high quality products. But it is conceded that there are competing brands of comparable quality to that supplied by Carvel. Thus, the restraints imposed by Carvel go far beyond the pale of legality and have for their obvious purpose a clearly defined and unlawful restraint of trade.

ARGUMENT

I

The Carvel-dealer contracts constitute unlawful tying agreements in violation of § 3 of the Clayton Act and § 1 of the Sherman Act.

Tying contracts are condemned because their terms exclude other sellers from the market that would otherwise exist. *Black* v. *Magnolia Liquor Company*, 355 U. S. 24, 78 S. Ct. 106. In *Times-Picayune Pub. Co.* v. *U. S.*, 345 U. S. 594, 605, 73 S. Ct. 872, 878, this Court said:

> "Tying arrangements, we may readily agree, flout the Sherman Act's policy that competition rules the marts of trade. * * * Yet tying agreements serve hardly any purpose beyond the suppression of competition. * * * By conditioning his sale on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market."

A tying arrangement has been defined by this Court as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier".[12] And it is firmly established that when the sale of an unpatented product is tied to a patented one, a *per se* violation occurs

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[12] *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1, 5, 6, 78 S. Ct. 514, 518.

since "it is a bald effort to enlarge the monopoly of the patent beyond its terms". *White Motor Company* v. *United States*, 372 U. S. 253, 259, 83 S. Ct. 696, 700.

Under the early franchise, Carvel granted the dealer the right to use the Carvel name, sold him the patented display case and patented freezer of which it was the exclusive distributor and which could only be used in conjunction with its patented Front Assembly Plate (see SOP Equipment Specifications), loaned him (for a rental fee) the patented Front Assembly Plate, special building signs and insignia, and required him to construct a store in accordance with its patented building design and exclusive plans and specifications, only upon his agreement to buy only Carvel Special Formula Mix, to purchase from Carvel all equipment necessary for the operation of his store, to purchase from Carvel all paper goods, ingredients and other supplies, and to sell no frozen product other than that processed from Carvel mix through Carvel freezers.

The later franchise ostensibly, but not in practice, modified the foregoing restrictions only in two areas; by requiring the dealer to equip his store and keep it maintained "in accordance with the specifications contained in the Manual". These specifications (Section M of the SOP) provide, *inter alia*, that the Ice Cream Freezer have Carvel's patented Front Assembly Plate, and that the Refrigerated Front Display Case be that patented by Carvel. The dealer is also ostensibly permitted to purchase printed paper goods from sources other than Carvel but only on condition that Carvel license such other source to print the Carvel name on such paper goods and to manufacture them "in accordance with Carvel standards". This authority is purely illusory since no adequate specifications or standards are published by Carvel which competitors can follow in order to satisfy Carvel's requirement.

The Equipment Sales Contract used in conjunction with the later franchise provides that the Front Plate Assembly, which is not sold to the dealer, may be used only in compliance with the terms of the franchise which requires the dealer to purchase mix, all ingredients and supplies only from Carvel, and binds him to sell only Carvel's Frozen Dairy Product "solely in accordance with the Manual" and to sell no other product. Pertinent provisions of the Manual are as follows:

Section B, entitled "General Operation: Preface",

> "2. It is the Dealer's responsibility to devote the store and the premises solely to the display of equipment and conforming to Carvel specifications, point of sale materials and to the sale of Carvel frozen dairy products and for no other purpose."

Sections H and I, Supply Division and Allied Equipment, contain lists of Commissary Supplies which "must be purchased through your Carvel Merchandising Division", and of Allied Equipment which "is available through your Carvel Merchandising Division. Items to the specifications of these items must be used in the operation of your store." It is significant that no specifications are given and thus, in effect, the dealer must purchase these items from Carvel.

Carvel Exhibit C-2 (R. 155, 3485)[13] discloses the following patented equipment: front plate assembly, roof crown, combined service and display counter, combination freezer and dispenser, agitating and scraping mechanism for use in ice cream freezing chambers, and apparatus for agitating and dispensing frozen foods. It is these articles that are sold and leased to the dealer upon the condition that they shall be used only with the other goods supplied by Carvel. It is to be noted that the revised franchise and SOP did not change this condition. Nor did the letter of

[13] This exhibit was brought to Court pursuant to Rule 38.

February 27, 1956, Exhibit C-1B, affect the dealers under the early franchise who had been required to purchase their equipment from Carvel.

The early franchise, as well as the loan agreement provide that the front plate assembly, signs and other equipment therein specified, are loaned to the dealer only for use in connection with the franchise and for so long as he complied with its terms. The front plate assembly, it should be explained, is the dispensing part of the freezer and gives to the ice cream the distinctive swirl effect. It is covered by a Carvel patent, is not made by any other supplier, and must be used with the equipment in the Carvel store (R. 34). In addition, the pre-1955 equipment sales contract (Pl. Ex. 3, R. 349, 3154) provides on its reverse side:

> "It is specifically understood and agreed that the above equipment is sold subject to Franchise Contract • • • and to be used only in conjunction with Franchise Contract • • •."

The later franchise requires the dealer to equip his store and maintain it "in accordance with the specifications contained in the Manual" (Ex. 8A). Although the franchise seemingly gives the dealer the right to acquire his equipment from non-Carvel sources, this right is illusory. For the SOP specifications provide, *inter alia*, that the ice cream freezer be equipped with Carvel's patented front assembly plate (Section M, item I) and that the refrigerated front display case be that patented by Carvel (Section M, item IX). The equipment sales contract (Pl. Ex. 4, R. 239, 3156) provides that the loan of the front assembly plate is conditioned on its use only in compliance with the terms of the franchise which, it has been shown, requires the dealer to purchase mix, ingredients and supplies only from Carvel, to sell only Carvel's frozen dairy product "solely in accordance with the Manual" and to sell no other product.

The signs and special equipment lease (Pl. Ex. 6, R. 242, 3158) grants the use of the front assembly plate, the

patented roof crown and other signs, conditioned upon the dealer's compliance with the terms of his store lease which, in turn, is conditioned upon his compliance with the franchise. And the provisions of Section B of the SOP require the store to display only equipment conforming to Carvel specifications and to sell only Carvel products.

Concerning paper goods, Section H of the later Manual lists required paper goods supplies, accompanied by the statement, "Items to the specifications of these items must be used in the service of Carvel Products". Examination reveals a complete absence of specifications. The dealer is thus afforded no opportunity to avail himself of the supposed freedom of choice purportedly granted by the later franchise. Vettel, in fact, testified that although there are other suppliers selling paper goods of similar quality, Carvel has *never* furnished any dealer with the required and apparently secret specifications necessary to meet its standards (R. 41).

It is thus clear that the Carvel system of operation involves the sale, loan or lease of patented and unpatented equipment on condition that the dealer use same only in conjunction with Carvel Special Formula Mix and other equipment and supplies required to be purchased from Carvel, and no other. Such agreements constitute *per se* violations of § 1 of the Sherman Act when the party imposing the condition has a dominant position with respect to the tying product and a not insubstantial volume of interstate commerce is affected. *Northern Pacific Railway Company* v. *U. S.*, 356 U. S. 1, 78 S. Ct. 514; *International Salt Co.* v. *U. S.*, 332 U. S. 392, 68 S. Ct. 12.

The *Northern Pacific Railway Company* case defined "monopoly power" or "dominance" over the tying product as nothing more than "sufficient economic power to impose an appreciable restraint on free competition in the tied product" (pp. 11, 521). And it is established that a patent is sufficient to supply the requisite of "dominance" for the application of the *per se* rule of unreasonableness

to tying arrangements. *Standard Oil of California* v. *U. S.*, 337 U. S. 293, 307, 69 S. Ct. 1051, 1059, the court saying:

> "A patent, * * * although in fact there may be many competing substitutes for the patented article, is at least prima facie evidence of (market) control."

The trial court found that there was no evidence that Carvel had the dominance required for a tying arrangement (R. 59) and the concurring opinion in the Court of Appeals held that "the patented items cannot realistically be considered the 'tying product' or the focus of the arrangement" (R. 452). The fact is that Carvel considers its patented freezer as a vital part of the franchise transaction (R. 42), producing them exclusively for franchised stores and none other. And the importance placed by Carvel on the patented front plate assembly, which gives the product the distinctive Carvel swirl effect, is underlined by the fact that Carvel will not part with title to it but merely leases it to the dealer (R. 34).

Judge Lumbard found that Carvel possessed the requisite economic leverage from "the use of the Carvel trademark as the principal feature of the Carvel franchising system" (R. 441). The same rationale that implies sufficiency of economic power from use of a patent or copyright in a tying arrangement applies with equal force to a trademark.

Moreover, this Court recently held in *United States* v. *Loew's Incorporated*, 371 U. S. 38, 83 S. Ct. 97, that the requisite economic power may be found on the basis of either uniqueness or consumer appeal. These attributes are claimed by Carvel in the Preamble to the later franchise (Pl. Ex. 1, R. 208, 3144-46). The patented equipment available only to franchisees, the uniform store constructed in accordance with a design patent, the uniform products manufactured from a secret formula mix, all contribute to

create an "uniqueness" as described by this Court in the *Loew's* case.

The concurring opinion quoted this Court's statement in *White Motor Co.* v. *United States*, 372 U. S. 253, 262, 83 S. Ct. 693, 701 to the effect that tying arrangements "may fall" in the category of *per se* violations, "though not necessarily so." (R. 450). We believe the concurring opinion misunderstood such statement. As used in the *White* case, we feel that the statement was made in the context of this Court's review of *per se* violations in the *Northern Pacific Railway* case where the Court merely demonstrated by illustration that a *de minimis* restraint on competition would not constitute an unlawful tie-in.

The trial court held that "the restrictions imposed by Carvel fall within the permissible limits approved in *FTC* v. *Sinclair Refining Co.*, 261 U. S. 463 (1923)". He further supported his position with *Pick Mfg. Co.* v. *General Motors Corp.*, 80 F. 2d 641, (7 Cir.) aff'd *per curiam*, 299 U. S. 3 (R. 58, 9). Neither case is applicable to the facts here presented.

The *Sinclair* case involved the lease of gasoline pumps and storage tanks on condition that the dealer would use them only for Sinclair's gasoline, but Sinclair did not own patents on the pumps or tanks or otherwise control their supply. Under the restriction there involved, the dealer could lease as many tanks and pumps from as many different companies as he desired and purchase their gasoline and other products. The court pointed out (261 U. S. at p. 475), that

> "The lessee is free to buy wherever he chooses; he may freely accept and use as many pumps as he wishes and may discontinue any or all of them. He may carry on business as his judgment dictates and his means permit, save only that he cannot use the lessor's equipment for dispensing another brand. • • • He can have respondent's gasoline, with the pump or without the pump, and many competitors seek to supply his needs."

The *Pick* case involved an agreement to use only General Motors parts in the repair of General Motors vehicles, but there was no restriction against the purchase, use and sale of parts acquired from others so long as they were not used in the repair of a General Motors vehicle.

The Court of Appeals also relied upon the *Pick* case as well as *Dennison Mattress Factory* v. *The Spring-Air Co.*, 308 F. 2d 403 (5 Cir.). The conditions of these cases do not obtain here. The Carvel dealer can use only Carvel mix with his equipment; he cannot sell any ice cream not made from Carvel mix; he must purchase all supplies and ingredients from Carvel; he cannot acquire equipment from sources other than Carvel, and he cannot sell any product of any kind not approved by Carvel. Even with this clear distinction, the principle of the *Sinclair* and *Pick* cases was rejected by the Supreme Court in the *Standards Stations* case (337 U. S. 293, 69 S. Ct. 1051). It was also pointed out in *U. S.* v. *American Linen Supply Company*, 141 F. Supp. 105, 111 (D. C. Ill.) that

> "the consideration of preserving good will that justified the Sinclair leasing arrangements * * * has been expressly rejected by the Supreme Court in two subsequent decisions in analogous circumstances."

In the *Spring-Air* case, Dennison manufactured and sold mattresses made under the Spring-Air trade mark. While certain restraints were imposed by the licensing agreement, Dennison was not prohibited from manufacturing and selling its private brand mattress. It was permitted to purchase materials for its private label from any source and was furnished with alternate sources of supply for material made under the trademark. Moreover, the license was cancellable by Dennison. By contrast, the Carvel dealer is restrained from purchasing non-Carvel material for the manufacture and sale of frozen dairy products even though they could be sold under a description that would not infringe the Carvel mark. The Spring-Air

license did not restrain competitors of Spring-Air or its suppliers from competing for Dennison's business. Additionally, Dennison was not bound irrevocably to the license but could withdraw at will without suffering severe financial privation.

The evidence disclosed that Carvel entered into the agreements under review with all of its 400 dealers in approximately nine states. Thus, the restrictive provisions and practices affected all of Carvel's sales to its dealers of more than two million gallons of mix annually (D. Ex. C-11, R. 317, 3500),[14] and total sales in excess of four million dollars (R. 29). In view of this, it is difficult to reconcile the findings of both courts below that plaintiffs had failed to prove that a not insubstantial volume of commerce was affected. It is likely that such findings rested upon the proportion foreclosed of total commerce in these products. But that, of course, is not the standard in a *per se* tying violation, for it would convert such cases to "rule of reason" cases with the requirement of public injury to be established by an industry wide investigation. The standard in *Northern Pacific* is a quantitative one. So long as the seller is of sufficient size to exert some power and the amount of commerce restrained is not insignificant, the standard is met.

Thus, this Court's observation in *Standard Stations*, 337 U. S. at page 305, 69 S. Ct. at page 1058, that "tying agreements serve hardly any purpose beyond the suppression of competition" applies with full force to the situation here involved. The perniciousness of the tie-in is increased by the fact that Carvel is not even in the business of selling some of the tied products, but employs its economic power in its area of activity to compel its dealers to do business with suppliers in unrelated industries under arrangements that yield Carvel extraneous revenues.

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[14] Exhibit C-11 reflects a total of 1,865,560 gallons for only five states in 1959. Carvel stores operated in at least nine states.

In a searching study on the subject of tie-ins (Turner, Validity of Tying Arrangements under the Antitrust Laws, 72 Harv. L. Rev. 50-75), Professor Turner concluded with the following statement:

> "I conclude that the following compulsory tying arrangements, on a showing that they involve a not insignificant amount of commerce, could reasonably be held illegal *without proof that the seller has economic power in the market for the tying product and without regard to possible justification*:
>
> 1. Tie-ins on sales to users in which:
>
> (a) The tying and tied products are different products, used in varying proportions by buyers; and
>
> (b) the buyer is unconditionally obligated to buy the tied product from the seller at the seller's price; * * *" (emphasis supplied).

It is clear that the foregoing conditions exist in this case.

II

The exclusive dealing contracts, as integral parts of the unlawful tie-in arrangements, are per se violations of the antitrust laws.

It is undisputed that the Carvel franchise requires the dealer to purchase all his requirements from Carvel and to refrain from using or selling any competitive or other goods. It is also undisputed that Carvel has actively enforced this portion of the franchise.

In common with the tying agreement, the exclusive dealing contract boasts the same unlawful element, the exclusion of rival sellers. *Nelligan* v. *Ford Motor Company*, 161 F. Supp. 738, (DC SC) aff'd 262 F. 2d 556, (4 Cir.) but the Sherman Act "rule of reason" cannot be utilized to validate transactions proscribed by § 3 of the Clayton Act.

Dictograph Products, Inc. v. *Federal Trade Commission,* 217 F. 2d 821 (2 Cir). Nor does the grant to the dealer of the right to use the name "Carvel" effect a waiver of the provisions of the Clayton Act. *Anchor Serum Company* v. *Federal Trade Commission,* 217 F. 2d 867 (7 Cir). In the latter case, the contract in issue provided that

> " * * * in further consideration of the use by the parties of the second part of the word 'Anchor' as a part of their name * * * the parties of the second part agree to purchase from the party of the first part all their requirements of products manufactured and/or distributed by the party of the first part * * * ."

In commenting on this contract, the court said (p. 873):

> "It would require a naive mind to conclude, as petitioner would have us do, that the agreements under consideration could result in other than an adverse effect upon competition."

The court further ruled that it is not necessary to show the actual impact which a "requirements" contract has on competition. It is sufficient if it possesses the potentiality to impede a substantial amount of competitive activity.

Similarly, the "all requirements" provisions of the Carvel supplier contracts brings them within the confines of proscribed exclusive dealing arrangements, for their practical effect precludes the use by Carvel of any competitor's supplies. *United Shoe Machinery Corp.* v. *U. S.,* 258 U. S. 451, 42 S. Ct. 363; *International Business Machines Corp.* v. *U. S.,* 298 U. S. 131, 56 S. Ct. 701.

We had relied heavily on the *Standard Stations* case in both lower courts. The Court of Appeals held that this Court had departed from the inflexible rule there established in *Tampa Electric Co.* v. *Nashville Co.,* 365 U. S. 320, 81 S. Ct. 623, stating that the latter case had erected certain criteria which we had failed to meet (R. 447).

We do not subscribe to this view. We view *Tampa* as applicable to the facts peculiar to it, or close parallels thereto. We feel that this Court itself defined the limitations of the criteria established in *Tampa* when it said (pages 334, 631):

> "There is here neither a seller with a dominant position in the market as in Standard Fashions, supra; nor myriad outlets with substantial sales volume, coupled with an industry-wide practice of relying upon exclusive contracts, as in Standard Oil, supra; nor a plainly restrictive tying arrangement as in International Salt, supra."

The plain implication is therefore, that if any of these conditions prevail, *Tampa* will not be applicable. And, we submit, under the circumstances of our case, *Tampa* is not applicable.

We return, then, to *Standard Stations*. This Court ruled that it was *not* necessary to show that competition had actually diminished. In words permeated with far-reaching and long range effect, it said (337 U. S. at page 311, 69 S. Ct. at page 1060):

> "We are dealing here with a particular form of agreement specified by § 3 and not with different arrangements, by way of integration or otherwise, that may tend to lessen competition. To interpret that section as requiring proof that competition has actually diminished would make its very explicitness a means of conferring immunity upon the practices which it singles out."

The court then went on to say (pp. 312, 1061):

> "It seems hardly likely that, having with one hand set up an express prohibition against a practice thought to be beyond the reach of the Sherman Act, Congress meant, with the other hand, to reestablish the necessity of meeting the same tests of detriment to the public interest as that Act had been interpreted as requiring."

Thus, the court concluded that (pp. 314, 1062):

> "the qualifying clause of § 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected. It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage * * *."

We therefore find here restrictive tying agreements, coupled with exclusive dealing agreements involving a dominant seller and numerous outlets with substantial sales volume. As a result, competitors are shut out of the market by an agreement that limits it, not in terms of quality, but in terms of a particular vendor. And where the greater part of available outlets have been foreclosed to competitors by exclusive dealing contracts, the situation falls within the prohibitions of the Sherman Act. *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.*, 344 U. S. 392, 73 S. Ct. 361.

It follows, therefore, that the legal monopoly accorded the Carvel patents and trade marks cannot be expanded through unlawful restraints of trade or agreements which provide for Carvel's control of the use and sale of all products whether trademarked, patented or not. *Timken Roller Bearing Co.* v. *U. S.*, 341 U. S. 593, 71 S. Ct. 971; *U. S.* v. *Masonite Corporation*, 316 U. S. 265, 62 S. Ct. 1070. Nor does the fact that Carvel franchised stores display the Carvel trademark, signs or other insignia, permit Carvel to compel dealers to purchase exclusively all products from Carvel. *Englander Motors, Inc.* v. *Ford Motor Company*, 267 F. 2d 11 (6 Cir.).

There is no evidence in the record that the public associates a Carvel store as one where *only* Carvel products are sold. Despite the fact that the dealers in *Standard Stations* had uniform signs and uniform buildings, this Court refused to sustain the full requirement provision of

the contracts on the ground of possible deception of the public through display of the seller's trademark or trade name and the sale of products other than those acquired from the seller.

The Court may well take judicial notice of the operation of numerous types of stores, displaying uniform signs and having uniform store fronts, which deal not only in the products associated with the signs but in others as well.

The trial court sought to distinguish the facts here involved from the *Standard Stations* case (R. 61). In comparing the two, he referred to the requirement not to sell competing brands of ice cream and the prohibition against the sale of other products, "such as hamburgers and coffee", which are outside the competitive ice cream line. He stated that the "latter type of restriction was not involved in the *Standard Stations* case * * *." This was completely erroneous and prejudicial. Hamburgers and coffee never entered the case. The prohibition complained of banned the use of products allied to and part of "the competitive ice cream line", all of which are supplied by and required to be purchased from Carvel. Amongst plaintiffs' exhibits will be found #47 (R. 386, 3354) barring the use of an unauthorized soda machine, milk vending machine, selling unapproved soda beverage, using unauthorized paper cups; #52 (R. 278, 3358), barring the use of an unauthorized quart container; ##57 (R. 396, 3362), 58 (397, 3362) and 59 (R. 398, 3362), relating to unauthorized paper cups; #61 (R. 401, 3363), prohibiting unauthorized cakes, crackers and paper goods; #65 (R. 407, 3370), objecting to an unapproved cigarette machine; #66 (R. 408, 3371), barring an unauthorized soft drink bottle dispensing machine. The *Standard Stations* restriction concerned the purchase of tires, batteries and accessories from a designated source. It is clear, then, that the type of restriction with which we are confronted here is identical with that in the *Standard Stations* case. It is also clear that Carvel,

as the supplier of such goods, is competing with other suppliers. The conclusion that Carvel is not in the business of manufacturing ice cream, cones and napkins is not material. For that matter, Standard Oil was not in the business of manufacturing tires, batteries and accessories.

The trial court also sought a distinction in that the gasoline station dealers were independent contractors whereas the Carvel dealer functions "as an integral part of the entire Carvel operation" (R. 62). The fact is, and the record is clear, that the Carvel dealer is an independent business man. In addition, the court's statement concerning plaintiffs' failure to prove a relevant market is erroneous, for this was established (R. 30).

It seems clear that exclusive arrangements, such as are involved here, seriously interfere with competition in the channels of distribution. To the extent that a supplier blankets the market with outright exclusive arrangements or requirements contracts of excessive duration, the opportunity of rivals to compete is jeopardized and foreclosed. Whenever a seller, through preempting access to consuming markets, unduly restricts his rivals' opportunities to compete, the potential impairment of the competitive process or tendency to monopoly is readily apparent.

Congress enacted the Clayton Act to abort business practices having a reasonable probability of economic harm. Section 3 is an express condemnation of such practices demonstrably detrimental to competition regardless of countervailing considerations. While a business practice challenged under the Sherman Act could be absolved upon a showing of reasonable business purpose adapted to cope with peculiar economic conditions, exclusive arrangements were marked for illegality under the Clayton Act once the test of reasonably probable detriment to competition is met.

The trial court ruled that the prohibition of Section 3 was "not applicable to Carvel's restriction on the sale of goods outside the ice cream line since Carvel is not competing with such goods" (R. 61). We feel the trial court was in error in this view. The language of Section 3 does not make the prohibition against requiring a purchaser not to deal in the commodity of a competitor, "where the effect * * * may be to substantially lessen competition or tend to create a monopoly," one whose benefit is given *only* to competitors of the seller. Certainly the imposing of such a requirement upon a *purchaser* can be capable of injuring him in his business, from the lessening of competition on the monopoly it can create against him as to his purchasing of goods. The broad remedy afforded by 15 U. S. C. A. 15, giving *any person* injured as a result of an antitrust violation the right to seek damages, indicates that Section 3 was not intended to be limited to a specific class of persons.

III

Practical effects of the restraints.

There can be no question about the destructive effect upon competition of the various restraints. Pl. Exs. 16 (R. 351, 3206, 3227), 17 (R. 353, 3209), 18 (R. 354, 3211) and 19 (R. 356, 3211, 3326) graphically illustrate the treatment given to unapproved suppliers of mix, cones and other products who seek to do business with Carvel stores. The Court may note that the suppliers reflected in these exhibits are concerns of national reputation. It is hardly sensible that their products, widely accepted over the nation, could "dilute" the Carvel trademarks.

The dealers were constantly threatened for their use and sale of unauthorized equipment or goods. We have already mentioned Pl. Exs. 52, 57, 58, 59 and 61. Pl. Ex. 47 (R. 386, 3354) deals with unauthorized soda beverage, an

unauthorized beverage machine in the store, and an unauthorized milk vending machine maintained *outside* the store. Pl. Exs. 48 (R. 388, 3354) and 64 (R. 406, 3369) threaten termination of franchise for the unauthorized sale of Christmas trees on the premises (not in the store). Pl. Ex. 50 (R. 389, 3356) threatens termination not only for use of such products as potato chips and orange soda, but for unauthorized *electric lights* in the store. Pl. Ex. 51 (R. 391, 3357) also deals with the sale of unauthorized products, including Coca Cola. In this connection it seems pertinent that if the restrictions were intended solely to protect the trademark through a quality control system, it is difficult to see how the trademark could be jeopardized through the sale of a product such as Coca Cola which has become virtually a household word throughout the entire world.

Pl. Exs. 53 (R. 392, 3558), 55 (R. 394, 3359) and 57 (R. 396, 3362) threaten termination for use of unauthorized products and paper goods. Pl. Ex. 58 (R. 397, 3362) deems the use of an unapproved ten ounce cup a violation. Parenthetically, it is noted that control of the size of portions served can be utilized as part of a price maintenance policy. Similarly, Pl. Ex. 52 (R. 278, 3358) barred the use of a quart container. Pl. Ex. 59 (R. 398, 3362) deals with unapproved paper goods. Pl. Ex. 60 (R. 399, 3363) bars the use of unauthorized sodas and Pl. Ex. 61 (R. 401, 3363) threatens action for unapproved products, paper goods and window signs. It is interesting to note that this last letter bars the use of even unapproved paper goods with no name or the name of a different organization printed thereon. It is difficult to determine how the use of an unmarked paper container or one identifying a product with someone else could dilute the Carvel mark.

In Pl. Ex. 63 (R. 404, 3369) Carvel now approves the sale of *Carvel Cola* and *Carvel Root Beer*. The inference seems clear that the previous prohibition against the sale

of Coca Cola and other beverages was intended solely for anticompetitive reasons. But the permission to now sell Carvel Cola and Carvel Root Beer was conditioned upon their sale being subject to all of the conditions of the franchise (Pl. Ex. 80, R. 415, 3396).

Pl. Ex. 65 (R. 407, 3370) denies the use of a cigarette vending machine and Pl. Ex. 79 (R. 282, 3389) prohibits the sale of hot fudge sundaes. This does not involve unapproved goods; it is merely a particular item that has not received Carvel's approval.

The later franchise (Pl. Ex. 8A) ostensibly permits the purchase of paper products from other sources if they meet Carvel standards. D. Ex. C-1B (R. 283, 3514) purportedly gave this right to parties to the early franchise provided the paper goods met "the standards and specifications set forth in the Manual". The fact is that the Manual contains *no* specifications sufficiently adequate to enable a dealer to purchase paper goods from a supplier other than Carvel. The illustory nature of this option is demonstrated by Vettel's admission that Carvel has never supplied any dealer with its specifications for printed goods (R. 41).

The early franchise required all equipment to be purchased from Carvel whereas the later franchise gives the dealer the right to purchase elsewhere so long as the equipment is "in accordance with the specifications contained in the Manual" (Par. Ninth of Pl. Ex. 1). The letter of February 27, 1956 (D. Ex. C-1B) to parties to the earlier franchise extended to them that same apparent right. However, the specifications contained in the SOP include the Carvel patented freezer, display cabinet and front plate assembly. The first two can be purchased *only* from Carvel (R. 42) and the front plate can be leased *only* from Carvel and not otherwise acquired. Thus, despite the surface liberalization of the later franchise, the dealer is nevertheless still compelled to obtain his basic equipment from Carvel.

IV

Protection of the Carvel trademark does not justify the tying and exclusive dealing contracts.

Trademarks, unlike patents or copyrights, cannot be freely bought and sold. They can be assigned only in connection with the good will of the business in which the mark is used (Lanham Act).

It was said in *Ph. Schneider Brewing Co.* v. *Century Distilling Co.*, 107 F. 2d 699, 703 (10 Cir.) that

> "A trade-mark is a right appurtenant to a business or trade in connection with which the mark is employed. The right to a particular mark grows out of its use. Its function is to designate the goods as the product of a particular trader and to protect his good will against the sale of another's products as his."

In the light of the foregoing, it becomes important to examine the alleged Carvel trademarks and expose them to the light of day.

Analysis of the Carvel trademarks (Ex. C-2) reveals the following:

There are twenty alleged trademarks. Examination reveals that *all* have been issued to and are owned by Thomas Carvel. There is no evidence of any assignment or license to any of the Carvel corporations of any of the said trademarks. By the express terms of 15 U. S. C. A. 1060, an assignment *must* be in writing.

Moreover, of the twenty trade marks, four (Nos. 599,786; 647,627; 614,138 and 597,727) are on the supplemental register. 15 U. S. C. A. 1094 provides that where a trademark is registered on the supplemental register, the certificate is not *prima facie* evidence of ownership.

Further analysis reveals that three of the four trademarks on the supplemental register were registered more

than six years before the trial, as were four of the trademarks on the principal register (Nos. 550,082; 578,937; 567,263 and 544,880). Pursuant to the provisions of 15 U. S. C. A. 1058, a registration *shall* be canceled at the end of six years unless the registrant shall file an affidavit of continued use or reasons for nonuse, which affidavit must be accepted in writing by the Commissioner. No evidence has been offered to show approval by the Commissioner of the continued registration of these trademarks.

In addition, it is noted that two of the trademarks (Nos. 689,800 and 687,695) as well as three of the patents (Nos. 184,983; 184,037 and 185,131) are not only of recent vintage but pertain solely to mobile vehicles used in the retail sale of ice cream, and therefore have no relevancy to this action. Nine other trademarks on the principal register were registered in 1957 and subsequent thereto, or at a time *after* the execution of all of plaintiffs' franchises, as follows:

No. 716,227—May 30, 1961
No. 722,911—October 17, 1961
No. 716,302—June 16, 1961
No. 723,983—November 14, 1961
No. 677,440—April 21, 1959
No. 651,525—September 10, 1957
No. 651,524—September 10, 1957
No. 687,646—November 3, 1959
No. 668,451—October 14, 1958

Moreover, seven of the trademarks, Nos. 677,440; 651,525; 651,524; 687,646; 544,880; 621,412 and 668,451 relate to the registered names of specific products, such as Mamapalozza, Icy-Wycy, etc.

It is submitted that in the absence of proof of ownership of the marks, the defendants are debarred from asserting that the various restrictions and restraints are necessary for the protection of their trade marks. Moreover, aside from this deficiency, it has not been shown that the trademarks, or any of them, were transferred or licensed to the

defendant corporations as part of the business in which they had been utilized. The inference is plain that when Thomas Carvel obtained the trademarks, he did not obtain them in connection with *his* personally owned business, if any, the good will of which he wished to protect.

The protection of good-will and quality

It is well established that the protection of good will as justifying tying arrangements has been thoroughly rejected. *International Salt Co., Inc.* v. *U. S.*, 6 F. R. D. 302, 308, aff'd 332 U. S. 392, 68 S. Ct. 12; *International Business Machines Corporation* v. *U. S.*, 298 U. S. 131, 56 S. C. 701; *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821 (2 Cir.) It was pointed out in the *IBM* case that there was no contention that other suppliers than IBM could not meet the requirement and, in fact, it affirmatively appeared that others were capable of manufacturing cards suitable for the IBM equipment and that paper for that purpose could be obtained by such other suppliers. In this connection, Vettel testified that toppings of the same quality were obtainable elsewhere (R. 40, 1) and that other suppliers produce paper goods of comparable quality (R. 41).

In the *International Salt* case, the Supreme Court held that the validity of a need for salt of high quality did not justify the tying arrangements for the licenses designated usable salt not by quality standards but by reference to the vendor. Similarly, assuming, *arguendo*, the need for prescribing and controlling the quality of Carvel products, the franchise and supplementary agreements designated usable mix, paper goods, ingredients and supplies not by quality standards but by reference to Carvel products only.

It may be argued that quality control of the ingredients of food products is important not only for the protection of good-will but for the protection of the public as well. Granting such need, as was said in *International Salt*, standards must be provided by the vendor. Vettel admitted

that dealers were never advised of specifications for flavorings or toppings; they were never advised they could purchase such products from others if Carvel specifications were met; and that Carvel, in fact, would not permit such practice (R. 41). It is to be noted, also that the specifications in the recipe section of the Manual refer merely to "Carvel Chocolate", "Carvel Coffee Extract", "Carvel Vanilla", "Carvel Crunched Peanuts," etc. No specifications or standards are given designating the functional characteristics, properties or quality of the materials which may be used.

Thus, the Carvel dealer has no choice. He is prohibited from purchasing elsewhere, even products of equal or in fact superior quality. He is given no choice of meeting standards imposed as part of a valid quality control. But Carvel has failed to establish a valid quality control. The evidence shows to the contrary. Vettel admitted that the dealer may in fact dilute the product by not freezing or mixing it properly or by not using proper ingredients or in the proper proportions, and that, in the final analysis, *the quality really depended on the man doing the job in the store* (R. 40). The nature of the business is thus such that as a practical matter it is impossible to control the quality of the end product by the restrictions imposed. It is thus clear that the restrictions imposed are actually designed to eliminate and suppress competition between Carvel and unapproved suppliers.

The orthodox definition of the function of a trademark is to identify the origin or ownership of the goods to which it is affixed. *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 412, 36 S. Ct. 357. And while a trademark licensor is obligated to exercise some control over its use by a licensee, the Lanham Act may require no more than sufficient control to avoid deception of the public as to the origin or quality of the trademarked product. (60 Stat. 429 (1946), 15 U. S. C. § 1055.) But Carvel failed to prove that quality control and prevention of public deception

could *not* be accomplished by methods other than those drastically restrictive of competition.

In fact, Carvel has admitted its inability to control quality, which concededly depends upon the integrity and skill of each dealer, and the fact that Carvel obligates the dealer to take out product liability insurance for its benefit (Pl. Exs. 1 and 2) is a tacit acceptance of the probability that the product manufactured by the dealer may be such as to endanger consumers and will not always be of uniform quality.

We feel that the evidence amply demonstrates that Carvel has no concern with protection of quality for legitimate reasons.

On page 3 of Section G of the SOP Manual Exhibits 8 and 8a, Carvel advises the dealer how to trick the Health Inspector by concealing mix with potentially high bacteria count. It is sufficient, without comment, to merely note that the same admonition does *not* caution the dealer against serving such product to the public.

The hypocrisy of Carvel's quality control claim is glaringly displayed in Pl. Ex. 76 (R. 413, 3384), especially that part of the supervisor's report to Carvel on the store's "Products Quality Control." It will be noted that points are allotted to various categories with deductions to be made for deficiencies. Examination reveals the following startling contrast:

	Item	*Deduction (Points)*
E. 5	Any unapproved commissary	75
F. 3	Any unapproved paper goods	40
G. 22	Any unapproved items sold	80
J. 1	Any unapproved Equipment	50
C. 2	Product Tasty	2
C. 3	Product Firm	2
I. 1	Freezers properly sterilized	10
I. 3	Utensils properly sterilized	10
I. 4	Adequate Sanitary Precautions	2 (Each Item)

It is crystal clear that notwithstanding its pious declarations, Carvel's primary concern in its relations with dealers it not the purity or quality of the ice cream products, but the restraints prohibiting the dealers from using unapproved paper goods, equipment, commissary or selling unapproved items. It cannot therefore be gainsaid that Carvel's restrictions are imposed for the primary purpose of eliminating competition and foreclosing the Carvel store market to competitive suppliers. Parenthetically, it should be noted that the Manual nowhere prescribed the use of only Carvel water.

Even were we to disregard the above described infirmities inherent in the alleged trademarks, these restraints cannot be justified. It was said in *Timken Roller Bearing Co.* v. *U. S.*, 341 U. S. 593, 598, 71 S. Ct. 971, 975,

> "Nor can the restraints of trade be justified as reasonable steps taken to implement a valid trademark licensing system, even if we assume with appellant that it is the owner of the trademark 'Timken'. * * * Furthermore, while a trademark merely affords protection to a name, the agreements in the present case went far beyond protection of the name 'Timken' * * *."

Moreover, Carvel cannot argue that it must protect the quality of the product in order to avoid litigation because the dealer is required to carry $100/300,000 products liability insurance (Exs. 1 and 2). In addition, as Vettel and Simonson admitted, each State in which Carvel stores operate regulates and controls the contents of ice cream mix by law, and the store owners, as manufacturers of the end product, must be licensed by the state (D. Ex. E-7, R. 420, 3482) and are directly under the supervision and subject to the inspection and control of the Department of Health having jurisdiction. Thus, Carvel is adequately protected against quality dilution.

Since there is no evidence in the record that Thomas Carvel is himself engaged in the retail sale of Carvel ice

cream, defendants cannot argue that the restriction in the franchise agreements granted by the Carvel corporate organizations are necessary to protect *his* good will in the trademark or trade name "Carvel." Moreover, the fact that Thomas Carvel, on the record, is still the sole owner of the Carvel trademark, bars the corporate defendants from claiming rights under the Carvel trademarks in reliance on the fact that Thomas Carvel is a stockholder especially since the Court has dismissed plaintiffs' claims against him on the ground that he was in no way involved in these proceedings.

In *Ethyl Gasoline Corp.* v. *U. S.*, 309 U. S. 436, 459, 460, 60 S. Ct. 618, 626-7, the contention that unlawful restrictive agreements were necessary to protect the health of the public was rejected, the court holding that adequate protection could be effected without recourse to licensing devices capable of being used "for other and illicit purposes".

The record fails to support the court's conclusion that it would be impractical and burdensome for Carvel to furnish specifications of standards to its dealers. The uncontradicted evidence discloses that Carvel did furnish detailed specifications, standards and formulas to its suppliers (Exs. 10, 11, and 15, R. 196, 7). Since such material had already been prepared by Carvel, it could have been readily supplied to the dealers as a guide in the manufacture of the ice cream products. Or Carvel could have designated a number of approved suppliers with the dealer being free to deal and bargain with any of them.[15]

Nor would this impose an unreasonable burden of policing, as the court stated. Carvel maintains an extensive policing organization with myriad details to check on and supervise. Examination of Pl. Ex. 76 (R. 413, 3384) confirms this.

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[15] See *Engbrecht* v. *Dairy Queen Company of Mexico, Missouri*, 203 F. Supp. 714.

Carvel, without unreasonably suppressing competition, could have as effectively protected the goodwill in the trade marks by exercising all rights inherent therein. The agreements could have specifically warned the licensees that the purchase or use of any product, puchased from others, not made in accordance with Carvel specifications and standards would subject the licensee to infringement suits, injunctive proceedings and damages, as well as cancellation. *International Business Machine Corporation* v. *United States*, 298 U. S. 131, 56 S. Ct. 701. Instead of refusing to divulge such specifications or standards, it could have been ready and willing to disclose them to any supplier from whom a licensee wished to purchase, providing such supplier would agree to comply with the specifications and permit the product to be checked before delivery to the licensee. Such practice would dispose of the objections of both the trial court and the Court of Appeals to the impracticability of policing 400 dealers. Carvel, as the record reveals, does require its suppliers to comply with its specifications and would experience no difficulty in doing so under the conditions herein suggested.

It could have provided that should the dealer manufacture and sell ice cream not made in accordance with Carvel specifications and standards, such ice cream must either be sold under a different mark or name or the purchaser must be affirmatively informed that it is not Carvel ice cream. It could warn the dealers that to give a customer a competitive ice cream when the customer specifically requests Carvel ice cream would be regarded as a breach of the agreement.

Under the existing agreements the dealers may not only have their license cancelled if they breach any of the provisions but may also, by operation under the pre-1955 agreement, lose the Carvel freezers and the lease to their store and under the later agreement, lose their lease. If only the loss of the license to use the trade mark was involved, the dealers could exercise their freedom of choice of supplier

and with the retention of their facilities enter into a competing frozen dairy product business under a different mark and name. On the other hand, if the Carvel name and trade mark is really a valuable asset, the licensees would willingly comply with the recommended reasonable restrictions and Carvel would retain its goodwill.

V

Pursuant to agreement with Carvel, the supplier defendants are obliged to refrain from dealing with or selling to plaintiffs.

Hood Contracts (Pl. Ex. 10, R. 252, 3186).

On May 14, 1956, Hood entered into identical agreements with Carvel Dari-Freeze Stores, Inc. and Carvel Stores of New York, Inc. Pertient provisions are:

> "1. (Hood) agrees to manufacture as much Carvel mix as may be required by the various Carvel dealers * * * for the operation of their respective Carvel stores * * * and Carvel hereby agrees to purchase all its requirements of Carvel Mix in said area only from (Hood)."
>
> 5. (a) Dealers may order mix directly from Hood.
>
> 5. (f) (Hood) "agrees that he will deliver only Carvel Mix to Carvel stores, and no other ice cream mix or ice cream preparation of any kind."
>
> 7. (a) Hood is obliged to collect from each store on delivery.
>
> 7. (c) Hood may be required by Carvel to collect royalties due Carvel from the dealers.

Rakestraw Contracts (Pl. Ex. 15, R. 337, 3204, 5).

The agreement of May 14, 1956 with Carvel Stores of New York, Inc. is substantially identical with the Hood agreements of that date (Pl. Ex. 10).

Eagle Cone Contracts (Pl. Ex. 11, R. 264, 3186, 7)

The preamble refers to Carvel's "franchised dealers". Pertinent provisions are:

> 1. "The Supplier agrees to manufacture and sell to Carvel, and Carvel agrees to purchase from the Supplier * * * all of Carvel's requirements of the cones hereinafter described", for all the Carvel stores in the tri-state area of New York, Connecticut and Massachusetts.
>
> 4 (b) "The Supplier agrees to produce cones of the said design only for Carvel, and for no other person."
>
> 5. The quality of the cones shall be "no less good than the standard quality cones produced by the Supplier".
>
> 7 (a) Eagle will deliver on instructions from Carvel dealers.
>
> 8 (a) Eagle will print Carvel invoice forms.
>
> (b) Eagle will prepare and deliver the invoices to each store and bill the dealers at prices agreed upon by Carvel and Eagle.

It is submitted that the circumstances surrounding the various supplier contracts and the provisions thereof—the suppliers' obligation to separately invoice each store, to deliver to each store, to collect from each store (in the case of the dairies, to collect Carvel's royalties when requested to do so)—permit the inference that the supplier defendants must have known that the stores were independently owned and operated. They must have been aware, also, of the restrictive provisions of the franchise.

Carvel's letter to Dairymen's League (Pl. Ex. 19, R. 356, 3226) states:

> "We understand that the majority of dairies that sell mix are aware of the nature of the relationship of Carvel and its franchised dealers * * *."

Moreover, the Carvel-supplier agreements are "all requirements" contracts whereby Carvel undertakes to buy, and the supplier undertakes to sell, all of Carvel's requirements of the particular product. It is inconceivable that a supplier will enter into such an agreement without information as to what the requirements are and upon what they are based. The requirements were obviously not those of Carvel, but of the independently owned and operated stores franchised by Carvel. The suppliers must have been informed and must have known of the reasons, *i.e.*, the restrictive provisions of the franchise, why Carvel could undertake to contract for the purchase of all the requirements of hundreds of independently owned stores. The Eagle Cone contract, for example, was negotiated in five separate sessions over a substantial period of time (Martin Cain affidavit, par. 13 (Pl. Ex. 24, R. 135, 3245)). That contract was admittedly "unique in the industry" (Cain affidavit, par. 9) and none of Eagle Cone's competitors had that type of deal (Cain affidavit, par. 16). The conclusion is inescapable that, in view of the foregoing circumstances, the nature of the Carvel-dealer relationship must have been known to the supplier defendants. No other inference is possible, particularly in the light of Cain's statement (par. 9 of Exhibit 24) that

> "The contract was also advantageous to Eagle because *it assured a stable market* for it to sell. This factor was especially attractive to Eagle because of the fierce competitive nature of the cone industry where orders are given on an 'as needed' basis." (emphasis supplied)

It is clear that Cain's use of "stable market" (in reality, a captive market) could stem only from a complete aware-

ness of the restrictive provisions of the Carvel franchise. It is also suggested that the foregoing quotation is tantamount to an admission of an express intent to join with Carvel in suppressing competition.

It is further submitted that these Carvel-supplier contracts clearly constituted boycott agreements pursuant to which the suppliers each agreed to refrain from dealing with or selling to the dealers directly. The dairies agreed to deliver "only Carvel mix to Carvel Stores, and no other ice cream mix or ice cream preparation of any kind". Eagle Cone agreed to produce the cones only for Carvel "and for no other person". The clear intent necessarily inferable from the contracts themselves is to exclude competition and to preclude the dealers from purchasing directly from the suppliers the same or other products.

It may be contended that the Eagle Cone contract is removed from this category by reason of its apparent involvement with cones of a specified design. Such contention would not be persuasive. The contract provided for two types of cones, a "Major" and a "Buddy Twinkle". Cain's affidavit, par. 10, stated:

> "Actually, the 'Buddy Twinkle' went out of use shortly after the contract was signed and was substituted by our 'No. 40 cake cup cone' * * *."

Examination of the price list attached to Cain's affidavit and of Exhibit 45 reveals that the "No. 40 cake cup cone" was and is a standard Eagle Cone product produced for and sold to the trade, and is in no respect designed or adapted peculiarly for Carvel products. In addition, the design of the "Major" cone is shown to be identical with the reproduction of Eagle's "Flare Top Cones" appearing on Exhibit 45, which is also a standard Eagle product. Comparison reveals that while the Carvel cone has the word "Major" in place of the words "Flare Top", the size, shape and design of the two are identical. Each has the same swirl design; each has the word "cake" impressed

below the swirl; each has an identical design alongside the word "cake". The only difference is in the word "Major", but this is not a word or name that is part of a Carvel trademark or is otherwise identified only with Carvel or Carvel products. In fact, the swirl effect on the Eagle cones made for the general trade must inevitably cast doubt upon Carvel's claims of uniqueness by reason of its use of the swirl design.

Cain said further in his affidavit, par. 10:

> "Later, other type cones were sold by Eagle to Carvel, after negotiations were held between the parties."

Such other cones are not otherwise identified and no claim is made by either Carvel or Eagle that they were of a special design only for Carvel. The fact is that these were ordinary products produced in the regular course of business by Eagle and capable of being produced without difficulty by any other supplier. This was impliedly conceded by Cain in his affidavit, par. 9, when detailing the advantages accruing to Eagle by reason of the contract, he said:

> "Eagle could resort to its affiliated cone manufacturers in the East who could make the special Carvel cone to supply Carvel in the event of a labor dispute or an Act of God."

Caine's statement, par. 16, that Eagle has 15 major competitors in the area demonstrates clearly that the contracts excluded rivals from the market consisting of Carvel stores.

The testimony of Vettel further disclosed that the dealer can purchase only cones of a size designated by Carvel, and that if he purchased other sizes he would not be allowed to keep them, "and if he went to Eagle Corporation they wouldn't sell them to him" (R. 31).

It is therefore clear that Carvel enjoys a one hundred per cent monopoly of the independently owned and operated stores not only by virtue of the franchise agreements, but as a result of the concert of action of the suppliers. The situation is similar to that presented in *Associated Press* v. *U. S.*, 326 U. S. 1, 65 S. Ct. 1416, where the by-laws of the AP prohibited their members from selling or furnishing their spontaneous news to any agency or publications except AP. Just as in that case, the supplier contracts here involved restrict commerce because they limit the freedom of Hood and Rakestraw to sell Carvel mix *or any other mix* to the dealers; they limit Eagle in the sale of cones to the dealers; and they restrict the dealers' ability to bargain with other suppliers.

As the court pointed out in *William Goldman Theatres* v. *Loew's, Inc.*, 150 F. 2d 738, 743 (3d Cir.), no evidence was offered by any corporate officer of any of the defendants that there had been no agreement to exclude. The court said:

> "It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it."

All the circumstances present here compel the conclusion that between Carvel and the suppliers there was either agreement or at least acquiescence in a program of concerted action.

Thus, it is clear that the Carvel supplier entente constitutes a combination and conspiracy to boycott by withholding from the dealers all products except those specified by Carvel, and by restricting trade between the dealers and suppliers even in the specified products, and is thereby a *per se* violation of the Sherman Act.

While a supplier may ordinarily exercise his own independent judgment as to those with whom he will deal, that

right is subject to the condition that a particular method of doing business must not be violative of the Sherman Act. *William Goldman Theatres* v. *Loew's, Inc., supra.* Accordingly, it has been held in *Standard Oil Company of California* v. *Moore,* 251 F. 2d 188, 211 (9 Cir.), cert. den. 356 U. S. 975, 78 S. Ct. 1139, that

> "an agreement, combination or conspiracy between two or more persons engaged in interstate commerce, to withdraw or withhold custom from another, or with a class of others, is violative of the antitrust laws."

See also *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.,* 340 U. S. 211, 71 S. Ct. 259; *Associated Press* v. *U. S.,* 326 U. S. 1, 65 S. Ct. 1416; *U. S.* v. *Frankfort Distilleries, Inc.,* 324 U. S. 203, 65 S. Ct. 661.

The Eagle Cone contracts require that defendant to sell only to Carvel and no other, while the Hood and Rakestraw contracts require those defendants to deliver no other mix or ice cream preparation, other than Carvel mix, to the dealers. Thus, the clear purport of these agreements requires the suppliers to refrain from dealing with the operators. The restraint upon plaintiffs to purchase only from Carvel and to use only Carvel mix, coupled with the suppliers' agreements to sell only to Carvel and to deliver no other mix or ice cream preparation to the stores, effectively operate to prevent and preclude the suppliers from dealing directly with the plaintiffs.

In *Klors, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U. S. 207, 79 S. Ct. 705, it was held that concerted refusals by traders to deal with others constitute *per se* violations of the Sherman Act. Thus, the combination of Carvel and the suppliers takes from the plaintiffs their freedom to buy in an open competitive market. It deprives other suppliers of their freedom to sell the plaintiffs. It thus interferes with the free flow of commerce and has, by its nature and character, a monopolistic tendency.

It is clear from this Court's holding in *United States* v. *Parke, Davis and Company*, 362 U. S. 29, 80 S. Ct. 503, that a manufacturer who acts in concert with another or others to accomplish what he could lawfully accomplish when acting alone, may violate Section 1 of the Sherman Act. And, we submit, under the circumstances inherent in this case, the Carvel-supplier contracts, without more, are *per se* illegal. Such contracts as are here involved, whether considered as reflecting a horizontal understanding among distributors or a vertical one between manufacturer and distributor, are so anticompetitive in both purpose and effect as to be unreasonable restraints of trade.

VI

The evidence supports a finding of unlawful price maintenance policies.

It is firmly established that any fixing of prices by two or more persons violates Section 1 of the Sherman Act (except, of course, for "fair trade" agreements), *U. S.* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 60 S. Ct. 811; *U. S.* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 64 S. Ct. 805, and price fixing, absent authorizing statutes, is illegal *per se*. *U. S.* v. *Line Material Co.*, 333 U. S. 287, 68 S. Ct. 550.

It is undisputed that the early franchise (Pl. Ex. 2, R. 221, 3150) violates this proscription. Carvel has not appealed from that ruling of the trial court.

The issue remains whether the revised franchise (Pl. Ex. 1, R. 208, 3147) and SOP (Ex. 8A) effected any material change in Carvel's policy respecting resale prices. The later franchise ostensibly gave the dealer the right to determine prices and Carvel allegedly notified all dealers thereof by letter dated February 27, 1956 (Ex. C-1b, R. 283, 3514). It is contended, however, that despite the

apparently unequivocal language used, Carvel nevertheless continued to employ and carry out a policy of price maintenance at the retail level.

On May 24, 1956, Carvel wrote to Giberman complaining of his selling a cone at 15¢ when the SOP prescribed only 10¢ and 20¢ cones (Pl. Ex. 40, R. 379, 3281). Carvel asked him for the indentity of other stores selling a 15¢ cone so that it could "take whatever steps are necessary to have these stores conform to the operation as prescribed in the S.O.P." Carvel also told Giberman that he must "maintain the 10¢ and 20¢ selling prices as recommended in the S.O.P." and must "not go below the minimum portions prescribed in the S.O.P." This clearly indicates a policy and course of action to fix and maintain prices at the retail level.

It is noteworthy that Vettel denied that the dealer had to maintain the 10¢ and 20¢ price on cones after Carvel's alleged change of policy (R. 34).

The evidence is clear that Carvel continued to employ the post-1955 SOP to regulate and maintain prices. In Section J of that book, pages 16, 24, 41, 42, 44 and 48, all dated during 1957, still make reference to "Standard selling price." Despite this, Vettel swore that Carvel had not used the term "Standard prices" for at least four to six years (R. 170, 1).

On May 21, 1956, Carvel wrote to Giberman (Pl. Ex. 42, R. 275, 3283) commenting on his special sales and requesting to be advised of them in the future "so that we may approve them." The letter also contained the significant clause "*should* such sales be approved by us * * *." (emphasis supplied). In another letter to Giberman dated July 17, 1958 (Pl. Ex. 41, R. 381, 3281), Carvel threatened him with termination of his franchise for selling "at wholesale prices."

The franchise and SOP (Section D) require the dealer to use only Carvel approved advertising material and signs. Section B, page 18, item 5 of the SOP calls for the posting of signs as prescribed in Section D. The approved signs, posters and advertising mats furnished by Carvel to the dealers all had specified retail prices printed thereon (Pl. Ex. 39, 3280). To insure that such advertising material was used, Carvel instructed dealers that no credit for co-operative advertising would be given unless such advertisements were approved by Carvel *prior* to their publication (Pl. Exs. 28, R. 361, 3259; 36, R. 376, 3277; and 37, R. 377, 3277). In its effort to maintain prices by circumvention, Carvel prohibited the dealers from using the Carvel name in connection with signs of increased prices (Pl. Exs. 27, R. 274, 3259, and 46, R. 385, 3354). When Carvel would decide upon a price change, the dealers were so advised and received new signs and price stickers to paste over the old price (Pl. Exs. 26, R. 360, 3258; 29, R. 362, 3264; 31, R. 363, 3267; 38 R. 378, 3277). Plaintiff's Exhibit 89 (R. 418, 3641) is the Carvel Daily Feature Calendar for an entire month showing the prices of the features pre-determined by Carvel.

The requirement to secure advance permission from Carvel in order to run a special sale at prices below the standard permitted is identical in both the pre-and post-1955 SOP (Section K, p. 2). It is undisputed that Carvel regarded this as a mandatory provision. In (Pl. Ex. 25, R. 359, 3254), a Bulletin to all stores, Carvel stated:

> "As you know, under our Franchise Agreement, the stores are not permitted to conduct special sales without first having received permission from the parent organization."

Even when such approval is given, Carvel insists upon notifying other stores in the area of the dealer planning the sale so that they might have an opportunity to participate therein (Pl. Ex. 42, R. 275, 3283). Carvel thus employs the special sale to maintain a level of prices.

It is also clear that one facet of a resale price maintenance policy is control over the portions to be served (Pl. Exs. 29, R. 362, 3264; 40. R. 379, 3281 and 60, R. 399, 3363).

The Carvel system includes a board of governors consisting of various dealers appointed by Carvel. This group of dealers makes "recommendations for the change in the recommended level of price changes" (R. 35). At their meetings they discuss changes in the retail sales price of Carvel products (R. 36, 7). Carvel's recognition and acceptance of this function of the board of governors is apparent from the penultimate paragraph of Exhibit 40. The dealers themselves recognize Carvel's control over prices as witness the effort of some of them, at a dealer's convention in February, 1958, to recommend that "the selling price of items be increased" (p. 3 of Pl. Ex. 35, R. 368, 3275). While the result of this action is not indicated, the discouraging treatment it received permits an inference that the recommendation was disapproved.

The admission by Carvel that the board of governors makes recommendations of price levels at which Carvel products should be sold by the dealers (R. 35) is in effect an admission of unlawful price fixing. Before a recommendation could be made, the board must have reached an agreement as to what the level of prices should be. The fact that Carvel published prices as "suggested" prices does not immunize them, for they still remain prices agreed upon in concert by the board of governors representing the dealers by appointment of Carvel.

The Attorney General of the United States, in an opinion before the House Select Committee on Small Business on May 3, 1963, stated as reported in CCH #50190:

> "It proposed to advertise items at prices determined by an executive committee of the local druggists. The fact that prices would be stated in the ads is not controlling. It was in fact that the prices were determined and agreed upon which made the proposed plan illegal."

It is therefore apparent that Carvel utilized the dealers themselves to police and maintain the price structure. The dealers thus became agents in the price maintenance scheme and their concerted recommendation and approval of price changes was equally violative of law. The fact that some dealers may not have adhered strictly to Carvel's price structure does not cloak Carvel with immunity so long as it can be reasonably inferred that a price fixing system existed with the purpose of maintaining retail prices. *U. S.* v. *General Electric Co.*, 82 F. Supp. 753, 881 (D. C. N. J.).

It is fundamental that the illegality of a price maintenance arrangement may be shown by a system of policy, combinations or co-operative efforts. This Court held in *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 42 S. Ct. 150, which also involved "suggested" prices, that proof of illegal price maintenance needs no specific contract but may be shown by the defendant's methods in securing the cooperation of its dealers which are as effectual as agreements. And in *United States* v. *Parke Davis and Company*, 362 U. S. 29, 44, 80 S. Ct. 503, 512, the court amplified the *Beech-Nut* doctrine and held that judicial inquiry will not stop with a search of the record for evidence of purely contractual arrangements.

In seeking to disclaim any price maintenance policy, Carvel introduced Exhibit C-3, (R. 285, 3522) a letter to Giberman. Despite the apparent disclaimer, this letter still insisted that items be made and portions measured in accordance with the SOP. This letter, moreover, is directly contradicted by Carvel's letter to Giberman more than a year later (Pl. Ex. 41, R. 381, 3281), prohibiting him from making sales at wholesale prices and emphasizing that his franchise permitted only the sale

> "of the end product that is offered for consumption to the retail purchaser *as scheduled in the Standard Operating Procedure Manual at prices indicated therein.*" (emphasis supplied)

The trial court stressed Exhibit 46, (R. 385, 3344), dated September 3, 1957 (R. 67) but ignored the restriction in that letter against use of Carvel signs to indicate price changes.

Vettel testified that since some time in 1957, Carvel supplied signs without printed prices (R. 33, Exs. C-16 (3517) and C-17).[16] In particular, C-17 is a sign for the daily feature with no printed price. This testimony is contradicted by Carvel's letter to Pierce of September 8, 1958 stating that "we do not have signs for Daily Features without recommended prices" (Pl. Ex. 43, R. 276, 3284). The letter also states that price change stickers are available through the order department, but such stickers, as has been shown, were not blank but contained printed prices. The inference is clear that any price change stickers were available only if Carvel approved a sale "at a price below the standard permitted". Corroboration is found in Exhibit 89, (R. 418, 3641), the daily feature calendar for July, 1959, which reflects prices established by Carvel.

In its letter to Seu of March 20, 1959, part of Exhibit C-3, Carvel was referring to prices to be charged in a proposed wholesale business which, as Vettel pointed out, "would require an entirely new and different licensing arrangement for your store". C-3 addititionally contains copies of letters allegedly sent by Carvel to members of the public stating in substance that the dealer determines prices. It is submitted that copies of letters purportedly sent to strangers to these actions should be accorded no probative weight. These addressees were apparently customers at different Carvel stores which are independently owned. They were not, obviously, customers of Carvel nor had they any dealings with Carvel. Such letters are self-serving in nature.

[16] These exhibits were brought to Court pursuant to Rule 38.

Carvel additionally enforces its price maintenance policy through a system of supervision which reports amongst other things, on the use of unauthorized signs and the proper weight of the end products (Pl. Exs. 42, R. 275, 3283; 44, R. 277, 3286; 50, R. 389, 3356; 53, R. 392, 3358; 76, R. 413, 3384).

It is difficult to reconcile Carvel's claimed abandonment in 1955 of price fixing with its Bulletin of February 13, 1958 (Pl. Ex. 35; R. 368, 3275) relating to the convention just concluded at which Vettel "discussed the recommendation of some store owners that the selling prices of items be increased". It is obvious that if, in fact, Carvel had long since discarded price restraints, there would have been no occasion at that late date for such recommendations by *any* of the dealers.

It is submitted that the proof amply demonstrates that Carvel continued to pursue and enforce a policy of resale price maintenance implemented by an apparatus consisting of the following:

1. SOP requirements of "recommended" and "standard" prices

2. Required maintenance of 10 and 20 cent prices of cones;

3. Specifying the minimum size of portions in all end products;

4. Prohibition of sales at less than "standard" prices without prior approval;

5. Control over point-of-sale signs and other advertising material which dealers must use;

6. Threatening breach of franchise to dealers who used Carvel signs to advertise increase or decrease in Carvel's prices;

7. Soliciting the cooperation and agreement of dealers to report price deviations in order to secure adherence to recommended and standard prices;

8. Promotion of agreements or understandings between dealers, through the medium of the board of governors, to adhere to sale prices; and

9. A system of supervision which reports on use of unauthorized signs and the proper weight of the end products.

These factors clearly create a presumption of resale price maintenance which cannot be rebutted by self-serving letters but only by evidence of actual sales at other than the suggested prices. Carvel, with 400 dealers to call on, offered no such evidence.

The significance of the various signs, advertising material and price circulars emanating from Carvel was pinpointed by Judge Yankwich in *U. S.* v. *Food And Grocery Bureau of So. Cal.*, 43 F. Supp. 966, 972-3 (D. C. Cal.), when he said:

> "The butter and egg cards and other circulars of similar character, quoting prices on sugar and other commodities such as milk, cereals, baking powder, oleomargerine, from day to day, are distinctly price-fixing documents—as one of counsel for the defendants frankly admitted."

It is therefore clear that the contentions of Carvel that its policy is merely one of "suggesting" prices is sham. The conclusion is inescapable that the dealers are told what prices to charge and they are spied upon, graded, reported and subjected to various pressures to secure their adherence to such prices.

The cooperative advertising, using material furnished by Carvel which included reference to prices, affords an obvious opportunity for inference that the parties to the

cooperative advertising progroam have engaged in a price-fixing agreement. Such inference is buttressed by the Carvel requirement of advance approval of any such advertisements. This is a subtle form of coercion which, together with other forms of coercion as evidenced by the record, compelled adherence to a maintenance of price policy. Such coercion will not be condoned. *Simpson* v. *Union Oil Company of California*, 84 S. Ct. 1051, — U. S. —.

This Court will pierce the veil of any artificial device, however subtly contrived, to cloak a forbidden practice with the mantle of legality. The Carvel self-serving letters should be accorded no probative weight but should be treated as nothing more than clever draftsmanship. As this Court stated in the *Simpson* case (84 S. Ct. at 1058),

> "We refuse to let a matter so vital to a competitive system rest on such easy manipulation."

The only apparent contradiction to the plain import of plaintiffs' evidence, all of which emanated from Carvel itself, comes only from Carvel self-serving documents. This is no contradiction sufficient to create an issue for the trier of the facts. It is a self-denial designed to camouflage the practice and policy as clearly revealed by the exhibits which *followed* the pious declaration of February 27, 1956 (Ex. C-1B).

VII

Conclusion.

There can be no question but that the Carvel system has the capacity, tendency and effect to suppress competition in a particular line of commerce. Of particular significance in considering Carvel's intent and purpose to eliminate and foreclose competition is the franchise provision restricting the dealer from engaging in a similar business in the event of termination of his franchise. It is noteworthy that although the franchise granted the dealer a relatively small exclusive territory, the restriction against his engaging in a similar business after termination covered a radius of 25 miles. Since, once his franchise terminated, he could no longer use the Carvel name, he could not conceivably damage Carvel's trademark. Under such circumstances, the prohibition against engaging in a similar business in so large an area was an unreasonable restraint of trade and was obviously designed as such. The subject was treated in *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821, where the court said at page 823:

> "There are various terms of the agreements which serve to implement the exclusive dealing features, the most important of which is the following restrictive covenant which applies in case the agreement be cancelled by either party as would doubtless be the result of any persistent attempt by the distributor to sell the hearing aids of competitors:
>
> 21. In the event of the termination of this agreement by either party distributor expressly covenants and agrees that for a period of *one* year from the date of said termination the distributor will not directly or indirectly carry on or be engaged, employed or interested in any hearing aid business within the territory outlined in Paragraph 2 hereof * * *."

It is submitted that the record clearly establishes that Carvel embarked upon a course involving the attainment

of a scheme of uniform prices and the suppression of competition in a particular line of commerce, aided and abetted by the supplier defendants.

The key to this case is the economic power Carvel possesses over its dealers. Ostensibly, they are independent business men, but behind the legalistic facade of independence, there exists a servitude caused by the coercive pressures which Carvel exerts upon them. The chief factor of their relationship is the franchise with its compulsion to buy, use and sell products obtained only from Carvel and at prices determined by Carvel. It is quite clear that the dealer is no more than an economic serf rather than an independent entrepreneur free to buy and sell the goods of his choice. Constantly suspended over his head is the threat of termination with the consequences disproportionately grave to the dealer.

This case discloses what is probably the most remarkable, comprehensive and far-reaching bundle of restraints ever compressed into a single situation. They far outstrip the legitimate demands of trademark protection or quality control. These otherwise lawful purposes disappear in the overlapping webs of anticompetitive restraints spun by Carvel. The courts have often applied the term "pernicious" to proscribed tie-ins. We submit that the term is woefully inadequate to describe the tie-ins here involved.

There is no redeeming feature to the Carvel situation. The tentacles of the Carvel octopus, wherever they have reached, have strangled free enterprise with a frightening finality. Every facet, every feature, every factor of the Carvel franchise is designed solely to restrain and foreclose freedom of competition. The variety and miscellany of restraints have no other purpose. They have, in addition, no parallel in any recorded case.

The courts have frequently been met with the plea that protection of goodwill justifies a departure from strict enforcement of the antitrust laws. And just as often the courts have refused to permit such a plea, even when honestly advanced, to provide an immunity from the proscriptions of the Sherman and Clayton Acts.

We submit that the following factors clearly establish the Carvel purpose and intent to restrain commerce rather than to protect the trademark.

1. The aforesaid restrictive covenant at the termination of the franchise;

2. The requirement that Carvel signs and trademarks only may be used in or about the premises, thus making it impossible for dealers to purchase and sell non-Carvel products by indicating to the public by appropriate signs that the products so offered for sale are not Carvel products;

3. The requirement that dealers purchase all ingredients and supplies exclusively from Carvel or a single designated source and at prices fixed by Carvel either unilaterally or by agreement with such designated source;

4. The fact that Carvel receives a profit on all merchandise so purchased by dealers;

5. The restriction against the sale of any product not approved by Carvel;

6. The prohibition against engaging in any similar business elsewhere during the term of the franchise;

7. The failure and refusal of Carvel to supply specifications and standards for ingredients, paper goods and other supplies;

8. The policing system which placed primary importance on the dealers' use of unauthorized equipment and unapproved goods other than frozen dairy products,

with minor and secondary attention to the quality of the ice cream product;

9. The requirement, in the later franchise, that equipment comply with the specifications of the SOP which specified, *inter alia,* the Carvel patented items not obtainable elsewhere, thus nullifying the option in the franchise to obtain equipment from others than Carvel;

10. The obligation in the early franchise to acquire all equipment from Carvel;

11. The prohibition against the use of paper cups bearing a name other than Carvel;

12. Threatening competing suppliers with suit for trademark infringement or for inducing breach of contract if they sold to Carvel dealers, thus clearly indicating a plan to suppress competition since the trademark could be protected by Carvel furnishing such suppliers with its specifications to meet as a requirement for selling its dealers;

13. The prohibition in the early franchise against the sale of any frozen dairy product unless made from Carvel mix in a Carvel freezer whether or not such product was sold as a Carvel product;

14. The right to Carvel, in the early franchise, to recapture the freezers, in the event of the dealer's breach of the franchise, at a price ranging from 50% to 90% less than the dealer's cost, thus making it difficult and impractical for the dealer to engage in a similar business elsewhere;

15. The right of Carvel, in the event of the dealer's breach of the franchise, to evict the dealer and obtain title to the building, which had been erected at the dealer's expense, at approximately 50% under cost, with the price to be paid monthly for the unexpired term of the franchise, with no payment to be made for any month that a business was not operated on the premises;

16. The lease of the store premises, conditioned upon compliance with the terms of the franchise;

17. The conditional reassignment of the lease as security for faithful performance of the franchise;

18. The obligation to obtain advance approval for special sales so that neighboring dealers could be advised thereof and participate therein;

19. The obligation to maintain a 10 and 20 cent sales price on cones;

20. The imposition of "recommended" and "standard" prices;

21. The required use of Carvel signs and advertising material with prices printed thereon;

22. The promotion of agreements between dealers, through the board of governors, to maintain a level of prices;

23. The disapproval of quality products such as Coca Cola;

24. The agreements with the suppliers for all of Carvel's requirements which were, in fact, the requirements of the dealers;

25. The prohibition on the dairies against delivering anything but Carvel mix to the dealers;

26. The franchise requirement that if the dealer's business expanded, he would be obliged to purchase additional Carvel patented equipment from Carvel.

There is no question but that these varied restraints serve no purpose beyond the suppression of competition. No one of them is actually necessary for proper trademark protection. A trademark owner's natural interest in efficient performance and his goodwill is sufficiently protected by specification of the type and quality of the

product to be used under the trademark and conditioning the license therefor upon the use of materials which conform to such specifications. But this legitimate practice is foreign to the Carvel operation.

Merchandise of comparable quality is concededly available from sources other than Carvel or its designated suppliers. It was not established that equivalent equipment was unavailable. Carvel failed to prove that the restraints inherent in its franchise agreements and merchandising methods are no greater than reasonably necessary to protect its trademark and to protect the public against deception. The contrary is in fact true, and results in the emergence of a clearly perceptible pattern of illegality.

The acts and practices complained of were followed with respect to all of Carvel's dealers. All the 400 dealers were similarly affected. Thus, while one or more of the acts charged may not be separately violative of the antitrust laws, their inclusion as an integral part of an over-all scheme to restrain competition tars them with the brush of illegality. The demonstrated effect has been to force abdication of the dealer's independent judgment as to the merits of the tied products and to insulate them from the competitive stresses of a free and open market, and to preclude all other suppliers from such market. It may be logically argued that if the tied products were of superior quality, they could withstand unrestrained competition without the artificial protection of coercive conditions.

We submit that the record sufficiently establishes Carvel's very thorough violation of the antitrust laws. The quantum of power over the tying product prerequisite to Sherman Act violation is simply sufficient economic power to impose an appreciable restraint on free competition in the tied product. And we suggest that the requisite control of the tying product may, without more, be inferred from

the seller's success in imposing a tying condition upon a substantial amount of commerce in the tied product.

We further submit that in still another area, the agreements here involved are illegal *per se* as exclusive dealing agreements. We urge that in the context of this case, the exclusive dealing agreements, which can serve no other purpose but to restrain competition, are part and parcel of the over-all pattern of illegality. Indeed, absent such agreements, the unlawful framework of the Carvel system must collapse. We submit that these agreements, by their nature, purpose and use, call for the logical extrapolation of this Court's unambiguous words in the *Standard Stations* case which bordered on the threshold of *per se* illegality.

In effect, what the District Court and Court of Appeals have done is to immunize a trademark owner against the proscriptions of the Sherman and Clayton Acts. The trademark owner is thereby given greater liberties under the law than the owner of a patent or copyright. The decisions of the lower courts have, in effect, emasculated and repealed the antitrust laws with respect to the owner of a trademark.

Respectfully submitted,

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